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Supreme Court, U.S.
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**IN THE**
**SUPREME COURT COURT OF THE UNITED STATES**
**OCTOBER TERM, 1997**

**DUANE FLESCH - PETITIONER**

**VS.**

**CHARLES WRANOSKY - RESPONDENT**

# PETITION FOR WRIT OF CERTIORARI TO WISCONSIN COURT OF APPEALS

**DUANE FLESCH, PRO SE**
**ROUTE 1, BOX 278**
**NIAGARA, WISCONSIN 54151**
**(715) 251-4154**

23 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Can the Wisconsin Supreme Court deny petitioner's right to petition for review on the basis of a delay caused by an unexpected death, which is an act of God wholly beyond petitioner's control?

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1997**

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

## OPINIONS BELOW

The opinion of the highest state court to review the merits appear at Appendix A to the petition and is unpublished.

## JURISDICTION

The date on which the highest state court decided my case was February 5, 1998, and a copy of the order appears at Appendix B, p 9.

A timely motion for reconsideration was thereafter denied on February 13, 1998, and a copy of the order denying reconsideration appears at Appendix C, at p 10.

A jurisdiction of this Court is invoked under 28 U.S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right to access to the courts based on the First and Fourteenth Amendment right to petition.

## LIST OF PARTIES

All parties in the case appear on the cover page.

## STATEMENT OF THE CASE

The Wisconsin Supreme Court denied Petitioner's Motion For An Extension of Time to file a petition for review, even though the delay was caused by an unexpected death. The explanation for the denial is the fact that after the

30-day period: "There is no authority to extend the time in which to file a petition for review." **First Wis Nat Bank of Madison v Nicholaouo,** 87 Wis 2d 360, 274 NW2d 704 (1979); (Order, Appendix B, at p 9).

The circumstances under which this occurred are these: (1) Petitioner is pro se and is severely handicapped with deformed hands, and cannot type; (2) Petitioner had 30 days to learn the rules, compile his petition, and submit it to be typed, copied and filed by January 30, 1998; (3) Petitioner submitted it for typing and copying on January 26, to be completed and ready for mailing by January 28, at 4:30 p.m.; (Flesch Affidavit, ¶¶ 2, 3, 6, Appendix H, p 16, 17; and Hommrich Affidavit, ¶¶ 2, 3, Appendix F, p13).

(4) On January 28, at 11:45 a.m., while typing the petition, the typist's mother died unexpectedly (Hommrich Affidavit, ¶ 4, Appendix F, p 13, and Death Certificate, Appendix G p 15); (5) the typist could not finish typing the petition on time (Hommrich Affidavit, ¶ 5, Appendix, F, p 13-14; and Flesch Affidavit, ¶ 5, pp 16-17).

(6) On January 29, Petitioner called the Clerk of Appeals Court to explain; (7) on February 3, Petitioner filed a motion for an extension of time to file the petition (Motion, Appendix D, p 12; (8) On February 5, the motion was denied (Order, Appendix B, p 9).

(9) On February 12, Petitioner filed a motion for reconsideration, with affidavits and proof of the circumstances and death (Motion for Reconsideration, Appendix E, p 12; Flesch Affidavit, Appendix H, p 16; Hommrich Affidavit, Appendix F, p 13; Death Certificate, Appendix G, p 15); (10) On February 13, 1998, the Motion was denied (Second Order, Appendix D, p 10).

## REASONS FOR GRANTING THE WRIT

The Wisconsin supreme Court's harsh interpretation of the Wisconsin statute unfairly penalizes petitioner for an act of God. Petitioner has found no cases interpreting the time limitations this way. Early cases in this Court make clear that courts have the power to waive the time requirement under appropriate circumstances. See, e.g., **Grigsby v Purcell, 99 US 505, 506-507, 25 L Ed 354, 355 (1879); Richardson v Green, 130 US 104, 111, 32 L Ed 872, 874, 9 S Ct 443 (1889); Green v Elbert, 137 US 615, 621-623, 34 L Ed 792, 795, 11 S Ct (188) (1891).**

This Court has granted certiorari and decided civil cases that were filed after the 90-day period, without any mention of the time question. See, e.g., **Pierson v Ray, 386 US 547, 18 L Ed 2 d 288, 87 S Ct 1213 (1967).** And has held under circumstance less compelling than here, that statutory provisions did not eliminate power to hear appeals docketed after the time limit. See, **United Public Workers v Mitchell, 330 US 75, 86, 91 L Ed 754, 765, 67 S Ct 556 (1947).**

Cases deciding timeliness to the court of appeals have reached the same result without including any reference to a judicial rule-making power on the subject. See e.g., **Georgia Lumber Co v Compania, (1945) 323 US 334, 89 L Ed 280, 65 S Ct 293; R F C v Prudence Group, 311 US 579, 85 L Ed 364, 61 S Ct 331 (1941).**

These cases show that such a harsh interpretation of the Wisconsin statute is not supported by case law. Although the statutory language referred to may not say that the time limits may be inapplicable under certain conditions, it also does not say that they must be ruthlessly applied without regard to the circumstances presented here.

If the Wisconsin Court is correct, "the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted." **R F C, id, 311 US, at 582, 85 L Ed at 367.**

## CONCLUSION

Petitioner respectfully asks this Court to decide that the Wisconsin Supreme Court made an unfair interpretation of the statute in light of circumstances in this case and for the reasons stated above that the petition for a writ of certiorari should be granted.

Dated this July 27th, 1998.

"s/Duane Flesch, Pro se"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 30, 1997
Marilyn L. GRAVES
Clerk, Court of Appeals
of Wisconsin

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**The party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**No. 97-0594**
**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**DUANE FLESCH,**

**PLAINTIFF-APPELLANT,**

**V.**

**CHARLES WRANOSKY,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Duane Flesch appeals a summary judgement dismissing his action against Charles Wranosky and finding the action frivolous. Wranosky requests that this court find the appeal frivolous. We conclude that the trial court properly granted summary judgment but that the appeal is not frivolous.

Flesch's complaint alleged numerous causes of

action, some of which are not pursued on appeal. His brief also requests review of several interlocutory orders but does not make specific argument regarding those orders. We deem those issues abandoned as well. *See* ***Reiman Assocs. v. R/A Advert.,*** 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981). Other issues are argued for the first time in the reply brief. We will not decide those issues. *See* ***Schaeffer v State Personnel Comm'n,*** 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989). The dispositive issues are whether Wranosky's supporting papers were properly considered by the trial court and whether the court properly granted summary judgment dismissing Flesch's defamation, malicious prosecution and conversion claims.

The trial court properly considered Wranosky's supporting papers. Flesch cites statutes and cases that were superseded many years ago to support his argument that Wranosky's supporting papers did not meet statutory requirements. He also argues that the affidavits should not be considered because they conflicted with affidavits presented in another action. We conclude that the trial court properly considered the affidavits under the current statutes. In addition, the affidavits provide almost no factual material upon which the summary judgment depends. Each of Flesch's claims fails for more than one reason. While the challenges to Wranosky's supporting papers might take a difference as to some of the grounds for dismissal, the claims pursued on appeal were properly dismissed without resorting to the facts presented by the affidavits. Facts alleged in Flesch's complaint, his own supporting papers and documents that are subject to judicial notice provide an adequate basis for dismissing each of the claims pursued on appeal.

The defamation claim was properly dismissed because the statute of limitations expired. Flesch contends that Wranosky defamed him by making false accusations suggesting that Flesch stole a chain saw and a gun from a home owned by Flesch's uncle, George Vlach. The complaint alleges that Wranosky made defamatory statements to the police, courts, attorneys, district attorneys, judges, jury members and numerous other parties. These allegedly defamatory statements were made in Flesch's presence or were made known to him more than two years before he commenced this action. Therefore, the claims are barred by §893.57, STATS.

The malicious prosecution claim was properly dismissed because there was probable cause for the prosecution. Lack of probable cause is an essential element of an action for malicious prosecution. *See* ***Krieg v Dayton-Hudson Corp.,*** 104 Wis.2d 455, 461, 311 N.W. 2d 641, 642 (1981). Flesch was convicted by a jury of burglarizing Vlach's home. The trial court later vacated the judgement of conviction due to some unknown error in the trial. A conviction, even though reversed on appeal, is presumptive evidence of the existence of probable cause in a subsequent malicious prosecution action. ***Id.***

The conversion claim was properly dismissed because the undisputed facts contradict Flesch's complaint in which he alleged that he permanently lost ownership of a rifle. Flesch now concedes that the rifle was returned to him by Vlach's heirs who received the rifle from Wranosky after the criminal trial concluded. As a convicted felon, Flesch was not entitled to possession of the rifle until his conviction was vacated. Flesch does not allege that Wranosky or the heirs refused any demand for return of the rifle. In addition,

Flesch identifies no specific damages that he incurred as a result of his temporary loss of control over the rifle.

Although we uphold the trial court's dismissal of Flesch's action and its finding that the action was frivolous, [1] we decline to hold the appeal frivolous. Ordinarily, an appeal from a judgment finding an action frivolous will also result in a frivolous appeal because the appellant is put on notice by the trial court's decision that his arguments are untenable. In this case, however, the trial court's decision does not directly address all of the arguments Flesch makes on appeal and, particularly, the grounds that we conclude are dispositive. Flesch's brief raises numerous issues of fact that relate to Wranosky's malice and intent. We conclude that these issues are immaterial because Flesch's claims were properly dismissed regardless of Wranosky's malice or intent. Nonetheless, we cannot conclude that the brief as a whole raises issues that Flesch knew or should have known were non meritorious.

*By the Court* - Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1(b)5, STATS.

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[1] Whether the action before the trial court was frivolous is one of the issues not properly raised on appeal.

Office of the Clerk
**SUPREME COURT**
**110 E. MAIN STREET, SUITE 215**
**P.O. BOX 1688**
**MADISON, WISCONSIN 53701-1688**

**TELEPHONE (608) 266-1880**
**FACSIMILE (608) 267-0640**

**To:**

February 25, 1998

Hon. James B. Mohr
Vilas County Circuit Court
P.O. Box 171
Eagle River, WI 54521

John W. Saari, Jr.
Rodd, Mouw & Saari, S.C.
P.O. Box 757
Rhinelander, WI 54501

Duane Flesch
Route 1, Box 278
Niagara, WI 54151

You are hereby notified that the Court has entered the following order:

---

No. 97-0594 Flesch v. Wranosky L.C.#95CV215

Plaintiff-appellant, Duane Flesch, having filed a motion to extend the time in which to file a petition for review;

IT IS ORDERED that the motion is dismissed. There is no authority to extend the time in which to file a petition for review. First Wis. Nat. Bank of Madison v. Nicholaou, 87 Wis. 2d 360 N.W.2d 704 (1979). The motion itself cannot be liberally construed as a timely-filed petition for review since

it was filed beyond the 30-day limit.

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Marilyn L. Graves
*Clerk of Supreme Court*
Office of the Clerk

**SUPREME COURT**
**110 E. MAIN STREET, SUITE 215**
**P.O. BOX 1688**
**MADISON, WISCONSIN 53701-1688**
**TELEPHONE (608) 266-1880**
**FACSIMILE (608) 267-0640**

**To.**

February 13, 1998

Hon. James B. Mohr
Vilas County Circuit Court
P.O. Box 171
Eagle River, WI 54521-0171

John W. Saari, Jr.
Rodd, Mouw & Saari, S.C.
P.O. Box 757
Rhinelander, WI 54501-0757

Duane Flesch
Route 1, Box 278
Niagara, WI 54151

You are hereby notified that the court has entered the following order:

No. 97-0594 Flesch v. Wranosky L.C.#95CV215

---

Plaintiff-appellant, Duane Flesch, having filed a motion for reconsideration;

IT IS ORDERED that the motion is denied. As Flesch was previously informed, there is no authority to extend the time in which to file a petition for review.

---

*Marilyn L. Graves*
*Clerk of Supreme Court*

COURT OF APPEALS OF WISCONSIN - DISTRICT III

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. MOTION FOR 2 WEEK EXTENSION TO FILE PETITION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

## MOTION FOR 2 WEEK EXTENSION

DUANE FLESCH, APPELLANT, moves the court, pursuant to §§ 809.14 (1) AND 809.82 (2), for a 2 week extension to file a petition for review for the following reasons:

1. Appellant's petition was due on January 20, 1998.
2. Appellant is Pro se, and is handicapped with deformed hands and is unable to type and make copies.
3. Appellant submitted his petition to Evelyn Hommrich for typing and copying on January 26, 1998.
4. Evelyn Hommrich's mother died on January 28, 1998.
5. Evelyn Hommrich was therefore unable to complete the typing and copying of the petition.

WHEREFORE, Appellant requests an order granting a two week extension to file his petition for review.

February 3, 1998.

"s/Duane Flesch"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

SUPREME COURT OF WISCONSIN

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. MOTION FOR RECONSIDERATION OF MOTION FOR 2 WEEK EXTENSION TO FILE PETITION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

## MOTION FOR RECONSIDERATION OF MOTION FOR 2 WEEK EXTENSION TO FILE PETITION

DUANE FLESCH, APPELLANT, moves the court, for reconsideration of petitioners' motion, filed pursuant to §§ 809.14 (1) and 809.82 (2), for a 2 week extension to file a petition for review, based on this motion and the attached affidavits of Evelyn Hommrich and petitioner which attest to the following facts as grounds for the previous motion and this present motion:

1. Appellant's petition was due on January 30, 1998.

2. Appellant is Pro se, and is handicapped with deformed hands and is unable to type and make copies (See Flesh aff, EX D).

3. Appellant submitted his petition to Evelyn Hommrich for typing and copying on January 26, 1998 (See Hom and Flesch aff, EXS C and D).

4. Evelyn Hommrich's mother died unexpectedly on January 28, 1998 (See Hom aff EX C, and att death cert.).

5. Evelyn Hommrich was therefore unable to complete the typing and copying of the petition. (See Hom Aff, EX C).

WHEREFORE, Appellant requests an order allowing petitioner to file his petition for review with the Supreme Court.

February 12th, 1998.

"s/Duane Flesch"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

SUPREME COURT OF WISCONSIN

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. HOMMRICH AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

HOMMRICH AFFIDAVIT
IN SUPPORT OF MOTION FOR RECONSIDERATION

STATE OF WISCONSIN }
} ss.
COUNTY OF MARINETTE }

EVELYN HOMMRICH, being duly sworn, deposes and says, based on personal knowledge:

1. I am submitting this affidavit for use in support of a motion for reconsideration filed on behalf of Duane Flesch in the Wisconsin Supreme Court in the above-titled action.

2. On January 26, 1998, Duane Flesch requested that I type and make copies of his Petition for Review to the Wisconsin Supreme Court.

3. The paperwork was to be completed for mailing to the court by 4:30 p.m., on January 28, 1998.

4. On January 28, 1998, at 11:45 a.m., I went to my mother's home and found my mother had died unexpectedly (See att Death Certificate Mildred Joyce Pringle).

5. Because of my grief and having to respond to the tasks that arose from this unexpected crisis, I was unable to complete the task of typing and copying the Flesch Petition in time for Flesch to meet his deadline.

6. The delay on filing the action was not caused by any neglect on the part of Flesch.

7. I have completed the typing of the petition and can submit the copies if Flesch's motion is granted.

February 12th, 1998.

"s/Evelyn Hommrich"
989 Main Street, #1
Niagara, WI 54151
(715) 251-1171

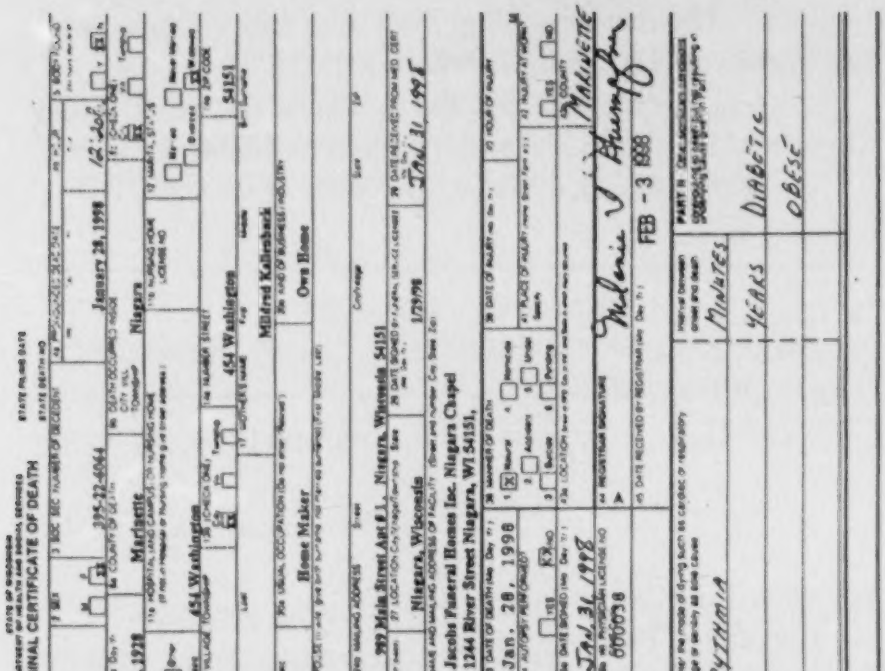
Subscribed and Sworn by me
this 12th day of February, 1998.
"s/Victoria E. Nault"
Notary Public
My Commission Expires: 2/4/01
County of Marinette
State of Wisconsin

**MARINETTE COUNTY REGISTER OF DEEDS**

I hereby certify that this is a true and correct reproduction of the record filed in the office of the Marinette County Register of Deeds.

Date: February 3, 1998

"s/Melanie I. Huempfner"
*Register of Deeds*





APPENDIX G

SUPREME COURT OF WISCONSIN

DUANE FLESCH,
PLAINTIFF - APPELLANT

V. FLESCH AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

CHARLES WRANOSKY,
DEFENDANT - RESPONDENT. NO. 97-0594

FLESCH AFFIDAVIT
IN SUPPORT OF MOTION FOR RECONSIDERATION

STATE OF WISCONSIN }
COUNTY OF MARINETTE } ss.

DUANE FLESCH, being duly sworn, deposes and says, based on personal knowledge:

1. I am submitting this affidavit for use in support of a motion for reconsideration filed on behalf of myself, Duane Flesch, in the Wisconsin Supreme Court in the above-titled action.

2. On January 26, 1998, I requested that Evelyn Hommrich type and make copies of my Petition for Review to the Wisconsin Supreme Court.

3. The paperwork was to be completed for mailing to the court by 4:30 p.m., on January 28, 1998.

4. On January 28, 1998, Evelyn Hommrich's mother died unexpectedly (See Hom aff, EX C, with Att Death

Certificate of Mildred Joyce Pringle).

5. Because of her grief and having to respond to the tasks that arose from this unexpected death, Evelyn Hommrich was unable to complete the typing and copying of my Petition in time to meet the filing deadline.

6. I am handicapped and my hands are deformed and I am unable to type and make copies and therefore, the delay in filing the petition was not caused by any neglect on my part.

7. On February 3, 1998, I mailed a motion for a 2 week extension to file the petition and on February 5, 1998, the motion was denied (att as EXS A and B are true and correct copies of the Motion and the Order).

8. I believe the circumstances warrant my being permitted to file my petition.

9. The petition is typed and if my motion is granted I will submit the copies immediately.

February 12, 1998.

"s/Duane Flesch"
Route 1, Box 278
Niagara, WI 54151
(715) 589-4154

Subscribed and Sworn by me
this 12th day of February, 1998.
"s/Victoria E. Nault"
Notary Public
My Commission Expires: 2/4/01
County of Marinette
State of Wisconsin